Supreme Court, U. S.
FILED
SEP 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-363

MICHAEL R. WOOD, dba NATIONAL PHOTO SERVICES,

Petitioner,

versus

CHACE COMPANY ADVERTISING, INC., a corporation, THOMAS CHACE, an individual; and BETTER BUSINESS BUREAU OF SANTA BARBARA, INC., a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL WOOD

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Santa Barbara, CA. 93108
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Attorney for Petitioner
In Propria Persona

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. _____

MICHAEL R. WOOD, dba NATIONAL PHOTO SERVICES,

Petitioner,

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CHACE COMPANY ADVERTISING, INC., a corporation, THOMAS CHACE, an individual; and BETTER BUSINESS BUREAU OF SANTA BARBARA, INC., a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Michael R. Wood, dba National Photo Services, respectfully prays that a writ of certiorari issue to review the judgment, opinion, and order refusing

to stay issuance of the mandate entered in this proceeding on July 9, 1975, by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, not reported, appears in the appendix hereto. The opinion of the District Court for the Central District of California, which is also unpublished, appears in the appendix hereto.

JURISDICTION

The orders of the Court of Appeals for the Ninth Circuit were entered on June 9, 1975, and July 9, 1975. This petition for certiorari was filed within ninety (90) days of the two orders as of this date. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Court of Appeals deprived an appellant of procedural due process in relabeling his motion for reconsideration of dismissal of his appeal under Rule 27 [b] Fed. R. App. P. as invoking Rule 40 thereby rendering it untimely.

2. Did erroneous orders of dismissal and rejection of reconsideration thereof in effect affirm arbitrary dismissal of the action by District Court purportedly under Rule 37 [b] Fed. R. Civ. P. even though no motion or order under Rule 37 [a] either sought or obtained as a prerequisite?

A. If so, does the due process clause of the Fifth Amendment require a de novo hearing by a judge of the district court?

3. Does the Federal Magistrates Act, 28 U.S.C. §636 [b] [2] empower a U.S. Magistrate to "supervise discovery proceedings with full power to act in connection therewith"?

STATUTORY PROVISIONS INVOLVED

Federal Rules of Appellate Procedure

Rules 12(c), 26(b), 27(b), 28(e), 40, 40(a), and 41(b).

Federal Rules of Civil Procedure

Rules 37, 37(a), and 37(b).

Federal Magistrates Act

28 U.S.C. §636 [b] [2].

STATEMENT OF THE CASE

Petitioner submitted 400 photographs to respondents Chace Advertising Company and Thomas Chace for selection of 18 photographs for use in a certain advertising campaign for the Santa Barbara, California, Chamber of Commerce. Petitioner retained the copyrights therein and retained all rights to publish and reproduce said photographs for sale. During February, 1970, petitioner secured a copyright of the 400 photographs, and in March, 1970, petitioner delivered the negatives of all 400 photographs. Following return of the negatives by Chace, petitioner discovered during September, 1971, that Chace had used petitioner's "unselected" photographs in an advertising campaign, thereby infringing the copyright of petitioner and engaging in an unfair trade practice and unfair competition.

The complaint was filed on May 25, 1972, based on 28 U.S.C. §1338 and 15 U.S.C. §§15,16.

Petitioner also alleged, inter alia, that respondent Chace exercised monopoly control over use of photographs in the secondary market through boycotts, blacklisting and

lawsuits, including a certain written communication by and through respondent Better Business Bureau directed to petitioner's suppliers and customers in the photographic industry constituting a boycott of petitioner's photographic service which resulted in a refusal to deal with petitioner. The Chace letter flatly stated that the petitioner would get no work of any kind either from Chace or from other photographers and notified all vendors that Chace would reject any part of any project that was in any way serviced by any individual associated with petitioner, including but not limited to photo processing and other lab work.

Both sides sought and obtained discovery during the course of the proceedings. However, petitioner was never able to depose Thomas Chace by reason of dilatory and vexatious moves by him.

Petitioner's numerous discovery efforts thwarted by respondents resulted in petitioner's requests for sanctions which were to no avail, and, finally the trial judge terminated all of petitioner's discovery, and appointed a U.S. Magistrate to supervise Chace's deposition of petitioner,

and afterward, the trial judge adopted out of whole cloth the magistrate's report which was severely critical of petitioner and ultimately dismissed petitioner's meritorious cause.

Significantly, the trial court never attributes any disobedience to petitioner in connected with numerous hearings and motions throughout the course of the proceedings.

Instead, the memorandum/judgment is based upon events in Santa Barbara conjured up by the magistrate. E.g., tardiness when no notice of location; no notice by magistrate that was 8:30 and not 9:00 a.m.; magistrate allowed petitioner 18 hours to produce tapes which petitioner did in fact produce on the day following, yet the memorandum/judgment attempts to categorize all of this as "non-production of documents before the magistrate."

The United States Court of Appeals for the Ninth Circuit dismissed petitioner's appeal on April 21, 1975, and the order clearly and plainly shows that it was based on Rule 12 [c]:

> "Upon due consideration of appellee's motion, the appeal is dismissed for lack of prosecution. Rule 12 [c] Fed. R. App. P."

On May 8, 1975, petitioner mailed his motion for reconsideration of the foregoing order and the Clerk of the Court of Appeals filed the motion on May 12, 1975.

On June 4, 1975, respondents filed an unrequested "opposition brief" which relabeled petitioner's motion to reconsider under Rule 27 [b] as a petition for rehearing after judgment under Rule 40 which would have been untimely. The relabeling is based on an affidavit by Monte L. Widders, one of respondents' attorneys, and is attached hereto by appendix. The Court of Appeals merely assumed a contention in the Widders affidavit which is not in the record at all and which reads:

> "I was informed by the Court that mandate had not been issued because a petition for rehearing had been filed, although not within the time permitted by the Rules. The Clerk at that time suggested that I should request an exten-

sion of time in which to file opposition."

Thus the foregoing misconception of the record by the Court of Appeals, conceived by respondents' recharacterization of a Rule 27 [b] motion, based upon a telephone call, has effectively deprived petitioner of his day in court.

REASONS FOR GRANTING THE WRIT

A. The order of dismissal based on Rule 12 [c] and motion to reconsider such an order under Rule 27 [b] which erroneously resulted in a relabeling of the proceedings as a petition for rehearing by reason of an affidavit alluding to conversation by telephone with a court clerk, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

B. The District Court judgment based on Rule 37 [b] F.R.C.P. is erroneous because no motion or order under Rule 37 [a] sought nor obtained as a prerequisite. No party to any action can be in wilfull noncompliance under Rule 37 [b] without a motion and an order under Rule 37 [a] which

is a prerequisite thereto. It is only a violation of Rule 37 [a] that is cognizable under Rule 37 [b]. Dunlap Tire & Rubber Corp. v. Firestone Tire & Rubber Co. (1940, DC, Mass.) 1 F.R.D. 335; Wembly v. Diplomat Tie Co. (1963, DC, Md.) 216 F. Supp. 565, 573.

The decision in the instant case in effect affirms the judgment which is erroneous on its face. No factual dispute exists as to the absence of a Rule 37 [a] motion or order.

C. Is a United States Magistrate empowered to make ultimate decisions on the merits and "to supervise discovery proceedings with full power to act in connection therewith" in light of this Court's recent decision in Wingo v. Wedding, 41 L.Ed.2d 879?

A magistrate "with full power to act" is an awesome thing to contemplate. The instant delegation of power is as broad as the power delegated to the magistrate in Reed v. Board of Election Commissioners, 459 Fed.2d 121, which constituted an abnegation of judicial authority. District courts have no power to delegate such duties to

magistrates. T.P.O. v. McMillen, 460 Fed.2d 348.

Due process considerations require a de novo hearing and consideration by a judge of the district court.

In the instant case the magistrate, without any record of the previous proceedings, dealt out-of-hand and without any record to guide him. Most of the time the magistrate was absent from the deposition and much of the fact-finding was accomplished by telephone.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

MICHAEL R. WOOD
Counsel for Petitioner
1266 Coast Village Road
Santa Barbara, CA. 93108

APPENDIX

1. Copies of the opinion, judgment and orders of the Court of Appeals.

2. A copy of the opinion and judgment of the District Court.

3. Rule 37 [a] and 37 [b] Federal Rules of Civil Procedure.

4. Federal Magistrates Act, 28 U.S.C. §636 [b[[2].

5. Copy of the affidavit of Monte L. Widders, which was filed with the Court of Appeals.

APPENDIX 1

1. Copies of the opinion, judgment and orders of the Court of Appeals.

FOR THE NINTH CIRCUIT

MICHAEL R. WOOD, dba NATIONAL PHOTO SERVICES,

Plaintiff-Appellant

vs

CHACE COMPANY ADVERTISING, INC., a corporation THOMAS CHACE, and individual; and BETTER BUSINESS BUREAU OF SANTA BARBARA, INC., a corporation,

Defendants-Appellees

FILED
[illegible] 1975
[illegible] CLERK
U. S. COURT OF APPEALS

No. 75-1014

O R D E R

Before: WRIGHT and TRASK, Circuit Judges

Upon due consideration of appellees' motion, the appeal is dismissed for lack of prosecution. Rule 12(c) Fed. R. App. P.

BEST COPY AVAILABLE

Edward A. Wright

FOR THE NINTH CIRCUIT

FILED

JUN 4 1975

EMIL E. MELEI, JR. CLERK

MICHAEL R. WOOD, dba NATIONAL PHOTO SERVICES,

Plaintiff-Appellant

vs.

CHACE COMPANY ADVERTISING, INC., a corporation; THOMAS CHACE, an individual; and BETTER BUSINESS BUREAU OF SANTA BARBARA, INC., a corporation,

Defendants-Appellees

No. 75-1014

O R D E R

Before: WRIGHT and TRASK, Circuit Judges

Upon due consideration, appellant's petition for rehearing, incorrectly labeled motion, is denied as untimely, Rule 40 Federal Rules of Appellate Procedure.

FOR THE NINTH CIRCUIT

FILED

JUL 9 1975

EMIL E. MELEI, JR. CLERK
U. S. COURT OF APPEALS

MICHAEL R. WOOD, dba NATIONAL PHOTO SERVICES,

Plaintiff-Appellant

vs.

CHACE COMPANY ADVERTISING, INC., a corporation; THOMAS CHACE, an individual; and BETTER BUSINESS BUREAU OF SANTA BARBARA, INC., a corporation,

Defendants-Appellees

No. 75-1014

O R D E R

Before: WRIGHT and TRASK, Circuit Judges

Upon due consideration, the petition for rehearing, the petition for enlargement of time to file petition for rehearing and the petition to stay issuance of mandate pending application for writ of certiorari, are denied.

APPENDIX 2

2. A copy of the opinion and judgment of the District Court.

MAY 23 1974
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
ENTERED
JUN 10 1974
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL R. WOOD, dba NATIONAL PHOTO SERVICES,

Plaintiffs,

v.

CHACE COMPANY ADVERTISING, INC., a corporation, et al.,

Defendants.

Civil No. 72-1179-RJK

J U D G M E N T

This action came on for hearing on May 6, 1974, on this Court's order to show cause why the action should not be dismissed under Federal Rule of Civil Procedure 37. A decision having been duly rendered, and the Court having set forth its reasons for dismissal in its Memorandum of Decision,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing and that the action be dismissed.

DATED: May 23, 1974.

ROBERT J. KELLEHER
United States District Judge

Docketed
Mld copy Ptys
Mld Notice Ptys
JS-6

FILED

MAY 23 1974

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL R. WOOD, dba NATIONAL PHOTO SERVICES,

Plaintiffs,

v.

CHACE COMPANY ADVERTISING, INC., a corporation, et al.,

Defendants.

Civil No. 72-1179-RJK

MEMORANDUM OF DECISION AND ORDER DISMISSING ACTION

This action was filed May 5, 1972, by Michael R. Wood, dba National Photo Services, seeking injunctive relief and money damages. Plaintiff alleged a violation of the copyright laws of the United States (Title 17 U.S.C.) by Chace Company Advertising, Inc., a corporation, and Thomas Chace, an individual (hereinafter collectively "Chace"), and as a second cause of action, alleged a violation of the anti-trust laws of the United States. Additionally, plaintiff sought, as pendent claims, relief under state law.

The charge of copyright infringement arose as a result of the alleged use by Chace of one of plaintiff's copyrighted photographs. The anti-trust action alleges a group boycott by defendants of plaintiff and plaintiff's services and is based primarily on a memorandum written by Thomas Chace in which he indicates that Chace will "reject any part of any

job that has in any way been serviced by any individual in National Photo Services." (Complaint - Exhibit 3)

At the time this action was commenced, George Nicoletti, Esq., was attorney for plaintiff Wood. Defendants Chace were represented by Hillister, Brace and Angle, and defendant Better Business Bureau was represented by Monte L. Widders, Esq.

The record indicates that answers were duly filed on behalf of defendants Chace on July 14, 1972, and on behalf of defendant Better Business Bureau on November 27, 1972, following denial of a motion for a more definite statement.

On March 19, 1973, this Court, after hearing, denied the motion of Hollister, Brace and Angle to be relieved as attorneys of record for defendants Chace. On May 1, 1973, Hollister, Brace and Angle associated as attorneys of record Cavalletto, Webster, Mullen and McCaughey. Mr. Hugh Haferkamp, of that firm, has been active in representation of defendants Chace since that date.

On July 20, 1973, this Court approved the substitution of Michael R. Wood, attorney in propria persona, in place of attorney George Nicoletti.

It appears that discovery commenced prior to July of 1973, and that several depositions had been taken pursuant to an agreement between Messrs. Haferkamp, Nicoletti and Widders. Although there is some indication in the record of difficulties in discovery prior to the substitution of Michael R. Wood, in propria persona, as attorney of record, none was brought to the attention of the Court.

In August of 1973, plaintiff, in propria persona, filed several documents relating to discovery, including requests for production of documents from both parties and non-parties, and noticed the taking of thirty depositions of party and

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non-party witnesses. On September 17, 1973, this Court heard plaintiff's various motions for orders for production of documents. The Court denied plaintiff's Rule 37 motions as to two non-parties to the action and continued the hearing to September 24 on plaintiff's remaining motions. At the September 17 hearing, the Court explained to plaintiff that Rule 37 sanctions were not applicable to non-parties and seriously questioned plaintiff's competence to pursue this complex copyright infringement and anti-trust action in propria persona. The parties were strongly admonished to be more cooperative in resolving their differences regarding future discovery.

On September 24, this Court, after argument by counsel and recognizing that discovery in this action would require closer direction by the Court, ordered that the parties meet at Mr. Haferkamp's office on October 3, 1973, at 10:00 a.m. for the purpose of complying with Local Rule 3 to prepare and file by October 9, 1973, a written stipulation of issues remaining to be resolved by the Court, in compliance with Local Rule 3(1).

The Court also denied plaintiff's motion for sanctions as to defendant Better Business Bureau. Hearing on plaintiff's other motions regarding discovery was continued to October 29, 1973.

At the hearing on October 29, 1973, this Court ordered all motions regarding discovery denied, but did not impose sanctions on any party. It was the opinion of the Court at that time that many of the documents sought to be obtained by plaintiff were not relevant to the action, and that defendants were otherwise making a good-faith effort to comply with plaintiff's discovery requests.

In December of 1973, plaintiff filed 18 sets of

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interrogatories directed to the Chace defendants. Interrogatories 1 through 4 were answered prior to hearing on January 29, 1974, on the Chace defendants' motion for a protective order and on plaintiff's motion to strike answer and enter default judgment. All motions were denied at the hearing. On January 31, 1974, this Court, upon a review of the remaining interrogatories and request for production of documents, ordered, on its own motion, that all discovery be completed no later than February 20, 1974.

At the hearing on April 1, 1974, on plaintiff's motion for reconsideration, the January 31 order terminating discovery was vacated. The Court, however, recognizing that past difficulties in proceeding with discovery would probably continue, referred the matter to Willard W. McEwen, Jr., U.S. Magistrate, a special master in Santa Barbara, California, to supervise future discovery proceedings. The Court further ordered that the plaintiff, Michael R. Wood, present himself for his deposition to be taken by the defendants on April 15, 1974, at 10:00 a.m. at a place to be designated by the special master, and that defendant Thomas Chace present himself for his deposition to be taken by the plaintiff on April 22, 1974, at 10:00 a.m. The Court also ordered plaintiff's interrogatories, sets five through eighteen, which the Court considered to be in large part repetitive, oppressive, and of little relevance to this action, withdrawn without prejudice. Plaintiff Wood was then given opportunity to file additional interrogatories, with the requirement that such interrogatories be reasonably related to the subject matter of this case.

On April 15, 1974, the date on which plaintiff had been ordered by this Court to present himself for his deposition to be taken, he appeared in this Court and made an ex

parte motion for permission to file an interlocutory appeal from this Court's earlier order of reference to a special master to supervise discovery. Plaintiff's motion was denied. On April 29, 1974, hearing was held on defendants' ex parte application for an order dismissing plaintiff's action and for sanctions for failure to comply with this Court's orders and the orders of the special master relative to discovery. As support for this motion, defendants included an affidavit and interim report of the special master. That report indicates, essentially, that plaintiff has been singularly uncooperative in following the directions of the special master regarding discovery. Specifically, plaintiff failed to appear on April 15, 1974, at 10:00 a.m., as directed by this Court, and did not appear until approximately 2:45 p.m. on that day. On the following day, Tuesday, April 16, 1974, plaintiff's deposition was noticed for 8:30 a.m., but plaintiff did not appear until 9:45 a.m. Although the special master ordered Wood to produce certain documents in his possession, these documents were never produced by Wood. Also, in regard to the Chace deposition which commenced as scheduled on April 22, 1974, the special master reports that Mr. Wood refused to accept his instructions regarding procedures to be followed in taking the Chace deposition and repeatedly followed lines of questioning after appropriate objections had been sustained by him. The report also indicates that Mr. Wood has been evasive in responding to interrogation, frequently asserting a lack of recollection and the fact that he had not "thought about" certain subjects which were obviously subjects upon which he could have expected interrogation. Specifically, the special master comments that "many of the answers denying knowledge and recollection stretched one's credulity to the utmost, and on several occasions I found it impossible to

believe that Mr. Wood could not have recalled the particular point. In many respects, Mr. Wood's approach to the discovery proceedings has been cavalier and has certainly bordered upon being contemptuous, if not actually so." (Interim Report of Special Master, filed April 29, 1974.)

At the hearing on April 29, 1974, this Court denied both plaintiff's and defendants' ex parte applications for orders regarding discovery, but ordered that the case be set for hearing on order to show cause why the action should not be dismissed for failure of the plaintiff to comply with the orders of this Court. Such hearing was set for May 6, 1974, and both sides were given opportunity to file by May 2, 1974, memorandums of law and other material relative to that order to show cause.

At hearing on May 6, 1974, this Court heard argument by Mr. Wood regarding this order to show cause why the action should not be dismissed, and also representation from Mr. Wood of his attempts in the past and presently to secure counsel. The Court pointed out to Mr. Wood that on almost every prior proceeding, the Court had strongly advised Mr. Wood against proceeding in his own behalf in a case of this complexity, and that the Court had many times suggested that Mr. Wood acquire counsel prior to proceeding. All such advice by the Court has heretofore been rejected by plaintiff Wood, who persisted in his desire to continue in propria persona despite the frequent and significant difficulties encountered thereby.

This Court has on many occasions indulged various shortcomings on behalf of Wood, in the belief that, despite the difficulties presented, the plaintiff should be allowed to proceed in propria persona, should he desire to follow that course. Now, however, after nine months of proceeding

FPI SANDSTONE—
13-1-88—TSM—1193

in this manner, and nine separate hearings on matters solely related to difficulties arising in the discovery process of this case, the Court has come to the conclusion that willfulness is involved in plaintiff's failure to proceed in a lawyer-like manner for the purposes of conducting discovery. This conclusion is based on the nature and manner of plaintiff's own discovery efforts as evidenced by his extensive and often irrelevant interrogatories as noted above. In addition, the Court considers the applicable and appropriate portions of the interim report of the special master who was appointed by this Court to directly supervise and conduct future discovery in this case. Finally, the Court is cognizant of plaintiff's nine appearances before this Court regarding discovery matters.

Based on all of the above, the Court finds that plaintiff is willfully flouting the power of this Court to direct and control the discovery process of cases before it. To allow plaintiff to continue at this time to prosecute this action in the manner in which it has heretofore been prosecuted would constitute this Court's tolerance and acquiescence in an abuse of the processes of the United States District Courts. This Court cannot, and will not, tolerate that abuse. Accordingly,

IT IS ORDERED that this action should be and hereby is dismissed with prejudice under Federal Rule of Civil Procedure 37(b) for the failure of the plaintiff to comply with the Federal Rules of Civil Procedure, the Local Rules of the United States District Court for the Central District of California, the specific orders of this Court regarding discovery, and the orders of the special master appointed to supervise discovery in this case.

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FPI SANDSTONE—
13-1-88—TSM—1193

The Clerk of the Court shall send, by United States mail, copies of this Order to all counsel herein.

DATED: May 23, 1974.

ROBERT J. KELLEHER
United States District Judge

APPENDIX 3

3. Rule 37[a] and 37[b] Federal Rules of Civil Procedure.

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Rule 37. Failure to Make Discovery: Sanctions

(a) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b) (6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or incomplete answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of expenses of motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) *Sanctions by court in district where deposition is taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated un-

der Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35 (a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

APPENDIX 4

4. Federal Magistrates Acts, 28 U.S.C. §636[b][2].

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgments, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to—

(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

(c) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 3402 of title 18, United States Code.

(d) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause

APPENDIX 5

5. Copy of the affidavit of Monte L. Widders, which was filed with the Court of Appeals.

AFFIDAVIT OF MONTE L. WIDDERS

STATE OF CALIFORNIA)
) SS
COUNTY OF VENTURA)

I, MONTE L. WIDDERS being first duly sworn state as follows:

I am the attorney of record for the Appellee BETTER BUSINESS BUREAU OF THE TRI-COUNTY, INC. in the above-entitled action.

That Appellant's appeal was dismissed by this Court on April 21, 1975.

That pursuant to Rule 40(a) Appellant had until May 5, 1975 to timely file a petition for rehearing.

That Appellant's petition for rehearing was not filed with this Court until May 12, 1975.

That pursuant to Federal Rule of Appellate Procedure 41(a) the mandate of this Court was to issue twenty-one (21) days after entry of judgement on April 21, 1975 unless a petition for rehearing was timely filed.

Because, on its face Appellant's petition for rehearing was not timely filed Appellees did not file opposition to his motion for extension of time in which to file his opening brief, believing that mandate would automatically issue twenty-one (21) days after April 21, 1975.

When mandate failed to timely issue, I called the Clerk of this Court on May 20, 1975, for the purpose of determining the status of this matter.

I was informed by the Court that mandate had not issued because a petition for rehearing had been filed, although not within the time permitted by the Rules. The Clerk at that time

////

////

BEST COPY AVAILABLE

suggested that I should request an extension of time in which to file opposition.

DATED: June 3, 1975

Monte L Widders
MONTE L. WIDDERS

On this 3rd day of June, 1975, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Monte L. Widders, and known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

WITNESS, my official seal the day and year first above written.

Myrtle E. Revill
Notary Public

OFFICIAL SEAL
MYRTLE E. REVILL
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
SANTA BARBARA COUNTY
My Commission Expires Jan. 16, 1979

(VERIFICATION—446 and 2015.5 C.C.P.)

STATE OF CALIFORNIA,
County of _____ } ss.

I, the undersigned, say: I am the _____

in the above entitled action; I have read the foregoing _____

and know the contents thereof, and that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters that I believe it to be true.

I certify (or declare) under penalty of perjury, that the foregoing is true and correct.

Executed on _____ *(date)* *at* _____ *(place)*, *California*

_____ *(Signature)*

(PROOF OF SERVICE BY MAIL—1013a, and 2015.5 C.C.P.)

STATE OF CALIFORNIA,
County of Santa Barbara } ss.

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Santa Barbara *employed in, over the age of eighteen years and not a party to the within action or proceeding, that my business address is* 1266 Coast Village Road, Santa Barbara, California

_____; *that on* September 5, 1975 *I served the within* Petition for Writ of Certiorari to U.S. Court of Appeals for 9th Circuit.

_____ *on the* respondents

_____ *in said action or proceeding by depositing a true copy thereof inclosed in a sealed envelope with postage thereon fully prepaid, in a mail-box, sub-post office, substation, or mail chute (or other like facility), regularly maintained by the Government of the United States at* _____

in the City of Santa Barbara, *California, addressed to the attorney of record for said at the office address of said attorney as follows:*

Monte L. Widders, Esq.
168 North Brent St.
Ventura, Calif. 93003

Hugh J. Haferkamp, Esq.
Cavaletto, Webster, Mullen & McCaughty
112 E. Victoria, St.
Santa Barbara, Calif. 93101

I certify (or declare) under penalty of perjury, that the foregoing is true and correct.

Executed on _____ *(date)* *at* Santa Barbara, *(place)*, *California*

September 5, 1975

_____ *(Signature)*

WOLCOTT'S WITP. Rev. 8-71

BEST COPY AVAILABLE

Supreme Court, U. S.
FILED
AUG 9 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-363

MICHAEL R. WOOD, dba NATIONAL PHOTO SERVICES,
Petitioner,

v.

CHACE COMPANY ADVERTISING, INC., a corporation, THOMAS CHACE, an individual; and BETTER BUSINESS BUREAU OF SANTA BARBARA, INC., a corporation, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The jurisdictional posture of this matter is not reflected correctly in the Petition. The fact is that this Court does not have jurisdiction in this matter because the Petition for Certiorari was not timely filed.

The Petition was filed in this Court on September 8, 1975. The Judgment which Plaintiff seeks to have reviewed in this Court was entered in the United States

Court of Appeals on April 21, 1975, which was 140 days prior to the filing of this Petition. 28 U.S.C. § 2101(c) requires that the Petition for Certiorari be filed "within 90 days after the entry of such judgment or decree," and the period for applying for a Writ of Certiorari has not, to our knowledge, been extended by a justice of this Court.

Petitioner attempts to avoid the effect of his failure to file timely by alleging that he seeks review of a certain post-judgment order entered July 9, 1975, and then expands that to two post-judgment orders in his discussion of "Jurisdiction" by including an earlier order entered on June 9, 1975.

It is apparently true that a timely Petition for rehearing would have tolled the running of the 90 day period for filing a Petition for Writ of Certiorari in this Court, but it is also true that "the filing of an untimely petition for rehearing which is not entertained or considered on its merits . . . cannot operate to extend the time for appeal." *Bowman* v. *Loperena,* 311 U.S. 262, 266.

Rule 40(a) of the Federal Rules of Appellate Procedure provides that "A Petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order." No order enlarging the time was made by the Court of Appeal. Consequently, the Petition for Rehearing should have been filed on or before May 5, 1975. Plaintiff's "Motion for Rehearing and Reconsideration of the Court's Order Dismissing the Appeal Under Rule 12C" was filed on May 12, 1975, which was obviously untimely.

The Court of Appeals, acting to the benefit of the Petitioner, construed Petitioner's Motion as a "Petition for Rehearing" and denied his Petition on June 9, 1975, "as untimely." In view of the fact that Petitioner's filing of the Petition for Rehearing was denied as untimely, the time for filing a Petition for Certiorari in this Court expired July 21, 1975. Therefore, the present Petition was clearly not filed within the 90 days stipulated by 28 U.S.C. § 2101(c) and Rule 22 of the Rules of the Supreme Court.

Petitioner subsequently filed a document entitled "Petition for Rehearing" on June 18, 1975, almost two months after the entry of the judgment dismissing his appeal. The Court of Appeals summarily denied that Petition on July 9, 1975, by the order Petitioner ostensibly seeks to have reviewed.

Petitioner complains that the Court of Appeals improperly considered his "Motion for Rehearing and Reconsideration" as a petition for rehearing instead of a motion under Rule 27(b) of the Federal Rules of Appellate Procedure. It is not clear what effect Petitioner thinks should have been given to that motion if it were to have been considered as a motion under Rule 27(b). The sole procedure provided under the Federal Rules of Appellate Procedure to request the Court of Appeals to modify its own judgment is a Petition for Rehearing. Therefore, it would appear to have been clearly to Petitioner's benefit for the Court of Appeals to construe his document as a petition for rehearing instead of a motion under Rule 27(b).

Furthermore, it is clear that Petitioner could not properly have filed a motion under Rule 27(b) under the particular circumstances of this case. Rule 27(b) contemplates the filing of a motion for reconsideration

of an action taken by the Court of Appeals when that Court has utilized the authority granted by Rule 27(b) to act upon a motion for a procedural order "without awaiting a response thereto" from the adverse party. Thus, a motion for reconsideration, which can be made by "any party adversely affected by such action", serves the office of allowing a party who has not theretofore been heard in opposition to a procedural motion to present his position on the subject of the motion to the Court of Appeals.

In the first place, appellees' Motion to Dismiss the appeal was not a "motion for a procedural order." That point is expressly covered in the "Notes of Advisory Committee on Appellate Rules" relating to Rule 27. Those notes state:

> "Many motions seek relief of a sort which is ordinarily unopposed or which is granted as of course. The provision of subdivision (a) which permits any party to file a response in opposition to a motion within 7 days after its service upon him assumes that the motion is one of substance which ought not to be acted upon without affording affected parties an opportunity to reply. A motion to dismiss or otherwise determine an appeal is clearly such a motion. . . ."

> "The term 'motions for procedural orders' is used in subdivision (b) to describe motions which do not substantially affect the rights of the parties or the ultimate disposition of the appeal. To prevent delay in the disposition of such motions, subdivision (b) provides that they may be acted upon immediately without awaiting a response, subject to the right of any party who is adversely affected by the action to seek reconsideration."

Thus, Petitioner's motion entitled "Motion for Rehearing and Reconsideration" is clearly not the type of motion contemplated under Rule 27(b).

Secondly, Petitioner did file a response to appellees' Motion to Dismiss the Appeal. Petitioner's Opposition Memorandum was filed on or about March 25, 1975, and the Court acted upon appellees' motion on April 21, 1975. Thus, Petitioner was not a party adversely affected by an action taken by the Court "without awaiting a response" to the motion. Therefore, the basic purpose for the type of motion authorized by Rule 27(b) clearly does not apply to the circumstances of Petitioner's erroneously captioned motion in the Court of Appeals.

The conclusion obviously is that the Court of Appeals properly acted to Petitioner's benefit by treating his "Motion for Rehearing and Reconsideration" as a Petition for Rehearing under Rule 40. Petitioner not only received procedural due process, but he was protected against an adverse application of procedural rules. Notwithstanding that beneficial treatment, however, Petitioner's Petition for Rehearing was not timely filed in the Court of Appeals and therefore the Petition for Certiorari was not timely filed in this Court.

QUESTIONS PRESENTED

Respondents do not agree that Petitioner's question No. 3 is an issue presented by the Petition. The U.S. District Court appointed the Special Master under Rule 53 of the Federal Rules of Civil Procedure. That Court's action had nothing whatsoever to do with the Federal Magistrates Act. The fact that the attorney appointed as Special Master to supervise discovery

proceedings in this matter happened to be a part-time United States magistrate was purely a coincidence and his duties as Special Master were entirely independent of, and unrelated to, his duties and authority as a U.S. magistrate.

Additionally, we note that questions 2 and 3 both relate to the judgment of the District Court and not to the judgment of the Court of Appeals. Under the posture of this case, neither of those procedural items would seem relevant. However, we have discussed them briefly to demonstrate that neither question has any merit.

STATUTORY PROVISIONS INVOLVED

For the reasons set forth above under "Questions Presented", Respondents disagree with the Petitioner's statement that construction of the provisions of the Federal Magistrates Act, 28 U.S.C. § 636(b)(2) is involved in this matter. As indicated, the cited statute has nothing to do with the case at bar.

STATEMENT OF THE CASE

Respondents have substantial disagreement with Petitioner's statements concerning the basic facts and substance of the underlying litigation. Petitioner's assertions in that respect do not even accurately reflect his own allegations. Nevertheless, Respondents will not present a lengthy discussion of the underlying litigation at this time because this Petition does not concern itself with the facts of the underlying case.

There are, however, several points purporting to be statements of fact in Petitioner's "STATEMENT OF THE CASE" which are simply not correct. For example, Petitioner asserts that "Petitioner was never able to

depose Thomas Chace by reason of dilatory and vexatious moves by him." (Petition, page 5). A reference to Appendix 2 of the Petition itself will establish that Petitioner's assertion is incorrect. The District Court judge, in his "Memorandum of Decision", states that "Also, in regard to the Chace deposition which commenced as scheduled on April 22, 1974, the Special Master reports that Mr. Wood refused to accept his instructions regarding procedures to be followed in taking the Chase deposition and repeatedly followed lines of questioning after appropriate objections had been sustained by him." (Appendix 2, *Memorandum of Decision and Order Dismissing Action,* page 5).

The trial judge did not terminate "all of petitioner's discovery," as incorrectly asserted by Petitioner. In fact, on Petitioner's Motion (Petition, Appendix 2 *Memorandum of Decision,* p. 4, line 10), which motion was also urged by Respondents, the District Court judge vacated an earlier order terminating discovery as to all parties and, among other things, ordered that Mr. Chace present himself for his deposition at a specified time. The District judge did not appoint the Special Master solely to "supervise Chace's deposition of Petitioner," but, on the contrary, the Special Master was appointed to supervise all discovery proceedings. The court acted on request of the Respondents because Petitioner continually refused to follow proper proceedings and persistently presented irresponsible motions relating to discovery which required Respondent's counsel to repeatedly travel approximately 100 miles to Los Angeles and 100 miles back again to Santa Barbara and to prepare and file numerous documents to respond to Petitioner's motions. The appointment of the Special Master was the only practicable method of dealing with Petitioner's con-

duct. The Petitioner ultimately concluded by making a mockery of the proceeding under the supervision of the Special Master.

Petitioner incorrectly asserts that the trial court "never attributes any disobedience to Petitioner . . . throughout the course of the proceedings." As a matter of fact, the District Court judge stated that "Specifically, Plaintiff failed to appear on April 15, 1974, at 10:00 a.m. as directed by this Court and did not appear until approximately 2:45 p.m. on that day. On the following day, Tuesday, April 16, 1974, Plaintiff's deposition was noticed for 8:30 a.m., but Plaintiff did not appear until 9:45 a.m." (Appendix 2, *Memorandum of Decision,* p. 5)

Petitioner states in his Petition that he had no notice that the deposition on Tuesday, April 16, 1974, was to commence at 8:30 a.m. That is flatly not true because the 8:30 a.m. starting time was set by the Special Master at the conclusion of the proceedings on Monday afternoon in the presence of Petitioner. Additionally, Petitioner's failure to produce the tape recordings which had become the subject of interrogation and which were in his possession as ordered by the Special Master, is only one example of Petitioner's "non-production of documents before the magistrate." In fact, throughout the deposition proceedings, Wood persistently failed to bring with him documents that had been ordered to be produced by the Special Master. Finally, Petitioner refused to produce documents when Respondents' attorneys went to Petitioner's apartment for inspection of documents in accordance with the Special Master's order which had been entered pursuant to stipulation between Petitioner and Respondents' attorneys. That refusal by Petitioner

to comply with the order precipitated the Respondent's motion to dismiss the action.

Finally, as far as Petitioner's "Statement of the Case" is concerned, it is not correct that the Respondents filed an "unrequested 'opposition brief' " relative to Petitioner's motion to reconsider. The Federal Rules of Appellate Procedure do not permit an opposition brief. What occurred was that Petitioner, at the same time that he filed his "Motion for Rehearing and Reconsideration," also filed an "Application for Extension of Time to File Brief." Appellees filed a "Motion for an Extension of Time in which to file Points and Authorities in Opposition to Appellant's motion for an Extension of Time to File Brief" and pointed out that Appellant's time in which to file his opening brief had expired no later than February 17, 1975, and that no extension of time for filing the brief had been granted by a judge of the Court of Appeals. In fact, Petitioner had done nothing relative to the brief until long after appellees had filed their motion to dismiss on March 21, 1975, more than one month after Petitioner was required to have filed his opening brief under the most favorable interpretation of the situation, and more than five months late under our understanding of the Rules of Appellate Procedure.

ARGUMENT

(1) The Court of Appeals Correctly Treated Petitioner's Motion as a Petition for Rehearing.

As we have previously discussed, the Court of Appeals acted favorably to Petitioner in treating his "Motion for Reconsideration" as a Petition for Rehearing. We will not repeat our previous observations at this point.

(2) Action Under Rule 37(b) Is Not Limited to Orders Made under Rule 37(a).

Petitioner erroneously contends that an order must be made under Rule 37(a) before the Court is authorized to take action under Rule 37(b). Rule 37(b) specifically grounds the Court's action upon failure to obey an order to provide or permit discovery, which is not necessarily an order under Rule 37(a). In fact, the rule specifically contemplates that orders other than orders under Rule 37(a) may be the ground for sanctions under Rule 37(b).

The foregoing is made clear by the rule itself. Rule 37(b)(2) states that "If a party . . . fails to obey an order to provide or permit discovery, *including* an order made under subdivision (a) of this Rule or Rule 35, the Court in which the action is pending may make such orders in regard to the failure as are just, ..." (emphasis added) Thus, the section itself simply requires as a prerequisite a failure to obey an order to provide or permit discovery.

In the case at bar, the Petitioner failed to obey an order entered by the District Court judge on April 1, 1974. That order was an express order to provide discovery and the District Court found that Petitioner wilfully disobeyed that order and the orders of the Special Master supervising discovery. Consequently, Petitioner's wilful failure to obey the District Court's order relative to discovery was an appropriate foundation for the District Court's action under Rule 37(b) and the District judge was clearly justified in making the order dismissing the action.

The cases to which Petitioner makes reference are not applicable to the case at bar. In fact, it is difficult

to perceive the reason for the citation of the case of *Dunlop Tire & Rubber Corp.* v. *Firestone Tire & Rubber Co.,* (1940) (D.C. Mass.), 1 F.R.D. 335. That case simply involved a motion to strike a defense that a patent was invalid because of lack of utility and inoperation. The defendant had answered an interrogatory to the effect that it could not state the reasons why the patent lacked utility and was inoperative. The District Court denied the motion, stating that the defendant could still rely on that defense at trial even though it could not spell out the reasons for the lack of utility and inoperative effect because of a lack of familiarity with the patent.

In the case of *Wembley, Inc.* v. *Diplomat Tie Company,* (1963) (D.C. Md.), 216 F. Supp. 565, the defendant had made a motion to strike certain evidence presented at the trial on the ground that the plaintiff had not disclosed the evidence in answers to interrogatories some two years prior to trial. The court denied the motion, observing that the sanction of prohibiting introduction of certain matters into evidence when withheld by a party in disregard of an order of the court compelling an answer applied only where a court order had been made. The court pointed out that where the discovery procedure is set in motion by the parties themselves *without* a court order, the party seeking discovery must first obtain an order before Rule 37(b) becomes applicable.

Obviously, the *Diplomat Tie Company* case is considerably different from the case at bar. In the case at bar, the discovery procedure was set in motion by an order issued by the District Court and it was for violation of that order that the District Court acted. The court did *not* say in the *Diplomat Tie Company* case

that relief under Rule 37(b) was confined to cases where a Rule 37(a) order had first been obtained.

In any event, Petitioner's contention in this respect is not properly a subject to be considered at this juncture because it has nothing to do with the review of the judgment of the United States Court of Appeals.

(3) The Special Master Was Not "Empowered To Make Ultimate Decisions on the Merits" and the Decision in the District Court Was Made by the Judge After a Full Hearing.

It is difficult to understand Petitioner's position in point C under "Reasons for granting the Writ." The order referring the matter to a Special Master under Rule 53 did not extend authority to Attorney McEwen to make "ultimate decisions on the merits," as asserted by Petitioner. The District Court simply referred the matter to the Special Master for the purpose of supervising discovery proceedings in a situation with an extended history of difficulties in discovery matters and with proceedings in a City approximately 100 miles from the court. The final judgment dismissing the case was made by District Judge Kelleher after a noticed hearing on an Order to Show Cause, with the Petitioner present in court at the time notice was given and with Petitioner participating in the final hearing. The sole function of the Special Master relative to that hearing was to present a sworn "Interim Report."

The case at bar bears no resemblance to the cases cited by Petitioner. In *Reed* v. *Board of Election Commissioners,* 459 F.2d 121 (1st Cir. 1972), the appellants appealed from denial of a Motion for Preliminary Injunction. The primary contention by appellants was that the hearing on the motion had been before a magistrate, who had filed a report to the judge stating that the case "had been heard on the merits."

The Court of Appeals pointed out that the magistrate's statement was clearly not correct inasmuch as the case had not been heard on the merits at that point. The court did observe that a magistrate had no authority to make a decision on the merits of a case and that a District Judge cannot simply adopt proposed findings of a magistrate on a "pro forma" basis without notice to the parties.

In the case of *T.P.O. Inc.* v. *McMillen,* 460 F.2d 348 (7th Cir., 1972), the trial court had referred a motion to dismiss a civil case to a magistrate for ruling. The Court of Appeals held that the magistrate could not be empowered to exercise ultimate adjudicating or decision making and that the District judge could not delegate such motions to the magistrate. The Court of Appeals issued a Writ of Mandamus directing the District Court to vacate the magistrate's order and directing the court to continue with the case in the due course of business.

Obviously the Special Master in the case at bar made no decision whatsoever on the merits of this case, and he was never empowered to make any decision on the merits. The final decision in the District Court was made by the District judge, which is strictly in accordance with the procedure stipulated in the *Reed* and *T.P.O., Inc.* decisions. The judgment dismissing Petitioner's case in the District Court was entered after the "de novo hearing and consideration by the judge of the District Court" requested by Petitioner, at which Petitioner was given a full opportunity to present his case.

It is also not correct to state, as Petitioner does, that the Special Master did any fact finding in the instant case. The Master simply filed a report to the judge concerning the events and occurrences which he him-

self had witnessed during the course of the discovery proceedings without any recommendation, finding of fact, or even proposed action. The report was a factual recitation of the occurrences within the personal knowledge of Mr. McEwen in his capacity as Special Master.

We have previously noticed the point that this case has nothing to do with the Federal Magistrates Act. We will not review that point again, and will simply note that this contention also is one that involved District Court action and not action by the Court of Appeals.

CONCLUSION

This Petition for Certiorari should be denied. Petitioner sets forth no valid contention which involves anything other than a routine, clearly established rule of law. Petitioner has had innumerable hearings before the Court of the United States, with a great deal more process than that which is his due. Petitioner's incredible abuse of the powers of the Courts of the United States should be brought to a close.

Respectfully submitted,

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